



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**PETITION NO. 37 OF 2014**

**PETER NYAKUNDI & 6 OTHERS .....PETITIONERS**

**VERSUS**

**COUNTY GOVERNMENT NYAMIRA & 4 OTHERS.....RESPONDENTS**

**RULING**

1. I am delivering a ruling in this matter, not a judgment as it is expected today. The reasons why it is so will manifest itself at the conclusion of this ruling.
2. This petition dated 31<sup>st</sup> October, 2014 was filed by Seven petitioners named herein. They were all members of the Public Service Board of Nyamira County as commissioners thereof. The petition is filed against the county secretary, the Governor, the County Government, all of Nyamira County and the speaker and County Assembly, of Nyamira County, respectively.
3. The said petitioners as commissioners of the Public Service Board are in law and effect the employees of the 3<sup>rd</sup> Respondent- the government of Nyamira County. Their statutory functions and mandate included, inter alia, to carry out general recruitment exercise of the employees of the county Government as advised by the said government.
4. Pursuant to that advice from the 2<sup>nd</sup> Respondent- the Governor of Nyamira County, the Public Service Board, advertised for jobs, carried out the recruitment as per the advertisement, plus, curiously as it turned out later an inclusion of a separate list of the preferred employees from the 1<sup>st</sup> Respondent- the secretary of the county, and, 2<sup>nd</sup> respondent – the governor of the County.
5. The final list was rejected and the entire process rescinded by the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent respectively.
6. Consequently, the petitioners themselves were suspended from their office by the action of the 2<sup>nd</sup> Respondent after a one day resolution of the 5<sup>th</sup> Respondent, through its public service committee. The petitioners were neither informed of the goings- on against them, neither were they asked to respond to any grievances they had against them, real or imagined. Naturally, the petitioners felt aggrieved. They ran to court. Hence the petition herein.
7. As I delved into the petition with view to draft my judgment, it became increasingly clear as I waded through the petition, submissions and annexures that the bone of contention was their position as employees was in jeopardy, they were not asked to give their side of the story to the conflict as they are entitled to. They invoked their rights and freedoms under the Bill of Rights. They invoked the same in their petition to protect their employment. The underlying essence of their case was the future of their employment in government of Nyamira County.
8. Although the petition is filed as a constitutional petition, it is for the protection of the contract of employment. My reading of the petition, the submissions of the counsel for the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Respondents, the equally the submissions of the counsel for the 4<sup>th</sup> and 5<sup>th</sup> Respondent and finally, although belatedly, the submissions of the interested party, all converge on one issue, that this is an employee-employer issue.

9. That being undoubtedly the case, this court has no jurisdiction to deal with the petition with which it is now seized. The provisions of the Constitution are clear on this issue of jurisdiction. The matter therefore hinges on jurisdiction. Article 162(a) of the constitution is pertinent: Parliament in pursuant to that provision has established (a) Industrial court act, No. 20 of 2011 and Environment and land Court Act, No. 19 of 2011. All this is familiar to all of us.

Further Article 165(5)(b) says:

*“the High Court shall not have jurisdiction in respect of matters –(b) falling within the jurisdiction of the courts contemplated in Article 162(2)”.*

10. Accordingly, I direct that this matter be transferred to industrial court for hearing and final disposal, as it is jurisdictionally the proper court to be seized with matter is the labour relations court, also, called the industrial court. The nearest industrial court in Western region of this country is Kisumu. The file be and is hereby transferred to industrial court at Kisumu.
11. With respect, I disagree with the Senior Counsel Mr. Okongo Omogeni’s client- the speaker of the County Assembly, Joash Nyamoko who in his replying affidavit says, at para. 31, that **“this suit is a labour relation dispute fashionably clothed as a Constitutional petition”**. Even the industrial court has jurisdiction to determine applications for enforcement of rights and fundamental freedoms. See, ***Untied States international University vs. A- General & 2 others, Pet. No. 170 of 2012***. In that case the court held:

*‘that the Industrial court had jurisdiction to enforce not only labour rights in article 41, but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within a matter before it. Counsel for the Petitioner submitted that the totality of article 162(2) and 165 left no doubt that the High Court had a Constitutional mandate to determine questions concerning the enforcement of fundamental rights and freedoms despite the claw back provision of article 165(5), which reserved certain matters for the supreme Court, the Employment and labour Relations Court and Environment and Land Court. Counsel contended that the question of interpretation of the Constitution was vested expressly in the High Court under article 165(3)(d). The High Court having entertained rival arguments, considered whether the Industrial Court was competent to interpret the Constitution and enforce matters relating to breach of fundamental rights and freedoms, and whether employment and labour relations matters which raised constitutional issues filed in the High Court prior to the establishment of the Industrial Court should have been handled by the High Court. The court therefore held that, the Industrial Court as constituted under the Industrial Court Act, 2011 was a court with the status of the Court and was hence competent to interpret the Constitution and enforce matters relating to breach of fundamental rights and freedoms in matters arising from disputes falling within the provisions of section 12 of the Industrial Court Act, 2011. Ultimately the court ordered that both matters be transferred to the Industrial Court for hearing and disposal’.*

12. And Article 165(3)(b) says:

*“Subject to clause (5), the High Court shall have – (b) jurisdiction to determine the question whether a right or a fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened”, the High Court here includes the two other courts with the status of (a) **employment and labour relations; and (b) the environment and the use and occupation of, and title to, land**. Therefore what applies to conventional high Court as a superior court, applies equally to land and industrial court as both organic part of the High Court as a superior court.*

13. The advantage of the industrial court, determining this matter, is the wide powers or expanded jurisdiction of this court.

*S. 12(1) stipulates who may, take dispute to this court (a): disputes relating to or arising out of employment between an employer and an employee, amongst of nine others.*

*12(3) in exercise of its jurisdiction under this Act, the court shall have power to make any of the following orders- inter alia(vii): (five others)*

*“an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the court thinks fit to impose under circumstances contemplated under any written law; or*

*(viii) any other appropriate relief as the court may deem fit to grant. This is very wide power, much wider than the convention would grant.*

14. Therefore the petitioners would still rely on the alleged violations of rights and fundamental freedoms to attack the conduct of the respondents in this petition.

15. The industrial court is amenable to give relief to the aggrieved petitioners, subject to proving their claims on the balance of probability.

16. Thus the matter be and is hereby transferred to the jurisdiction of the industrial court for final determination of this petition dated 31<sup>st</sup> October, 2014.

17. It is so ordered.

**Dated and delivered at KISII this 13<sup>th</sup> day of March, 2015**

**C.B. NAGILLAH,**

**JUDGE.**

**In the presence of:-**

Oguttu for the petitioners

Mutiria holding brief for Nyachiro for the 1,2 & 3 respondents

Gisemba holding brief for Mongaka for interested party

Mutiria & Kaburi holding brief for Omogeni for 4<sup>th</sup> & 5<sup>th</sup> respondents

Edwin Mongare Court Clerk.